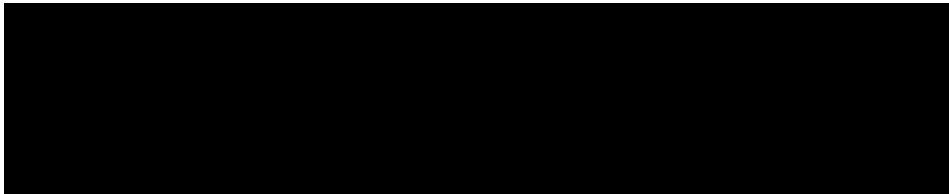


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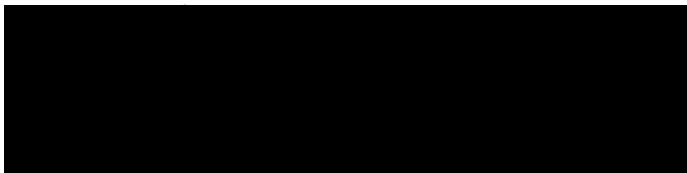
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FILE: LIN 03 186 52218 Office: NEBRASKA SERVICE CENTER Date: NOV 17 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

S Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a CAE and customer software development company. It seeks to employ the beneficiary permanently in the United States as a project engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 19, 2002. The proffered wage as stated on the Form ETA 750 is \$71,573 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 2000.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$24 million, to have no net annual income, and to currently employ 80 workers. In support of the petition, the petitioner submitted its 2001 Form 1065, U.S. Return of Partnership Income and bank statements.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 28, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of a federal tax return for 2002 and a Form W-2 wage and tax statement for the beneficiary to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date in 2002.

In response, the petitioner submitted its tax return for 2002 reflecting the following information:

Net income	(\$436,723)
Current Assets	\$3,903,872
Current Liabilities	\$4,868,034
Net current assets	(\$964,162)

In addition, counsel submitted a reviewed financial statement listing the same current assets and current liabilities as listed above and reflecting cash as of December 31, 2002 as \$990,385; copies of the petitioner's checking account statements for the period from December 2000 through September 2003; and the Form W-2 the petitioner issued to the beneficiary in 2002 reflecting wages of \$43,946.64, \$27,626.36 less than the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 7, 2004, denied the petition. In reaching his conclusion, the director noted the petitioner's net loss and negative net current assets, the lack of monthly increases sufficient to cover the monthly proffered wage in the bank statements, and the petitioner's failure to pay the full proffered wage in 2002. Finally, the director noted that the petitioner had filed immigrant petitions in behalf of other beneficiaries.

On appeal, counsel asserts that the petitioner had \$1,363,725 in "net cash provided by financing activities" and \$990,385 "in cash by December 31, 2002." Counsel notes that the petitioner managed to pay \$5,505,173.97 in gross wages in 2002. Counsel cites a nonprecedent decision for the proposition that bank statements merely need to demonstrate sufficient cash for one month of the proffered wage. Counsel further notes the receipt of capital in 2003. Finally, counsel concludes that the petitions for other beneficiaries are irrelevant to the petitioner's ability to pay this beneficiary. The petitioner submits its employment records, a "comprehensive report" as of May 3, 2004 prepared by Small Business Solutions characterizing the petitioner's operations as "profitable," the beneficiary's 2003 Form W-2 reflecting wages of \$21,592.98, evidence that the petitioner employed 126 employees at \$5,391,080.86 in 2003 and 2003 bank statements reflecting the influx of additional capital.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Specifically, any wages expended to pay the proffered wage in one month would not be available in subsequent months. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below as contributing to the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, where the petitioner has submitted the required initial evidence pursuant to 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary *at a salary equal to or greater than the proffered wage*, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002 or 2003.

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of wages paid towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of wages towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of payment of the

beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid the full proffered wage in 2002 or 2003. In 2002, the petitioner shows a net loss and negative net current assets. The petitioner, therefore, has not demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002. The petitioner has not submitted the initial evidence required under 8 C.F.R. § 204.5(g)(2) for 2003. As such, we are unable to evaluate how the influx of additional capital during that year affected the petitioner's overall financial

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

situation. Thus, the petitioner has not demonstrated its ability to pay the difference between the wages paid and the proffered wage in 2003.

While the petitioner has not demonstrated its ability to pay this beneficiary the proffered wage, we find that the director did not err in noting that the petitioner had filed other petitions for different beneficiaries. Counsel's assertion that such information is irrelevant would lead to the untenable result that a company could file ten petitions with the same priority date for ten different workers, having the ability to pay only one, and obtain approval of all ten petitions based on the same evidence.

Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.